Supreme Court, U.S.
FILED
SEP 9 1999
OFFICE OF THE CLERK

No. 99-111

In The

Supreme Court of the United States

RUSSELL D. MIKEL, *pro se* and
AMY C. MIKEL, *pro se*,

Petitioners,

vs.

RUTH ALLEN and MAE WENDORF,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES G. PRESTON*
CHARLES G. PRESTON, P.C.
P.O. Box 820
774-C Walker Road
Great Falls, Virginia 22066
(703) 759-3300

Counsel for Respondents Ruth Allen and Mae Wendorf

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. WAS JUDGMENT PROPERLY ENTERED FOR RESPONDENTS BY THE PRINCE WILLIAM COUNTY VIRGINIA CIRCUIT COURT IN HOLDING THAT THERE WAS NO CONTRACT BETWEEN THE PARTIES BECAUSE PETITIONERS' AGENT FAILED TO OBTAIN TWO REQUIRED CONTRACT ADDENDUM.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 6

I. Certiorari is not warranted because the trial court properly found for Respondents Ruth Allen and Mae Wendorf given that the contract was not completed in a material respect 6

A. It is within the province of the trial court to assess the credibility of witnesses and the probative value of their testimony 6

B. If the trial court is not plainly wrong, its findings defeat alternative theories and must be affirmed 6

C. The trial court properly found that no contract was created 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Cooper v. Cooper, 249 Va. 511, 457 S.E.2d 88 (1995) 7

Langman v. Alumni Assoc. of the Univ. of Virginia, 247 Va. 491, 442 S.E.2d 669 (1994) 6

Richardson v. Richardson, 242 Va. 242, 409 S.E.2d 148 (1991) 6

Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953) 7

STATUTES

42 U.S.C 485d 7

OPINION BELOW

The Prince William County Virginia Circuit Court on August 28th, 1998 issued its opinion finding that there was no contract between the parties because the real estate agent had failed to include in the contract lead based paint and radon addendum provisions required by the Respondents' contract offer.

The Prince William County Virginia Circuit Court on September 22, 1998 denied Petitioners' Motion for Reconsideration.

The Supreme Court of Virginia refused the petition for appeal in finding that there was no reversible error in the judgment complained of on February 12, 1999. The Motion to Reconsider was denied on April 16, 1999.

The relevant Orders are recited in Mikels' petition in Section VII Appendix, pp. 15-21.

STATEMENT OF THE CASE

Petitioners filed a Bill of Complaint for Specific Performance "(hereinafter Mikels or Bill of Complaint) with the Circuit Court of Prince William County Virginia, which alleged that Respondents Ruth Allen and Mae Wendorf (hereinafter Allen) breached a sales contract to close a real estate transaction with Mikels for the purchase of a piece of property located in Prince William County, Virginia ("Property"). Mikels alleged that there was a final contract and Allen denied that there was a

final and binding contract because two contract addendum required by Allen's contract offer had not been executed.

Allen filed an Answer and the case was tried before the Honorable Frank A. Hoss, Jr., on July 15, 1998. The trial lasted approximately four hours, and four witnesses were called upon to testify. The Mikels called the real estate agent, Ms. Tortorette, who negotiated the contract with Ruth Allen and Mae Wendorf, and Mr. Mikel. Allen and Wendorf each testified for themselves.

On September 28, 1998 an Order was entered finding for Allen and Wendorf. The trial court found that:

> "since I find that the lead based paint and radon provisions of the contract were part of the contract, and as required by the conduct of the parties, but were not included in the contract by Plaintiffs' agent, accordingly the contract was not complete and Defendants could properly terminate as they timely did."

The Mikels filed a Motion to Reconsider, on grounds substantially the same as advanced at trial and in this Writ of Certiorari, which was denied by Order of September 22nd, 1998.

The Mikels filed their appeal to the Supreme Court of Virginia on September 15, 1996. The Court refused the petition for appeal in finding that there was no reversible error in the judgment complained of on February 12, 1999. The Motion to Reconsider was denied on April 16, 1999. This Writ of Certiorari was filed on July 12, 1999.

STATEMENT OF FACTS

The Mikels had listed a property for sale at 9001 Center Street, Manassas, Virginia 20110. They were represented by a real estate agent for Long and Foster. The agent negotiated a sales contract on September 14, 1997, with Allen and Wendorf.

At the trial, Mikels' real estate agent's sales contract was shown to provide on page 6 for six check the box items, under paragraph 29 entitled "Additions". There was a box to check for "yes" I want that addendum, or "no" I do not want that addendum. Two boxes were check yes. The first was for "RADON ADDENDUM", and the second was for "LEAD-BASED PAINT AMENDATORY FORMS".[1]

The evidence showed that neither of these two addendums were finalized by the real estate agent for signature by the parties, as required by the purchasers Allen and Wendorf. These Long and Foster real estate agency's addendums provide for substantive rights to the purchaser should Radon or Lead-Based Paint be found, i.e., corrective action or contract termination. The Court found this failure by the Sellers' real estate agent to have obtained the two executed addendums fatal to a finding that there was a completed and binding contract.

The Judge stated his findings at trial as follows:

> "The lead based paint and radon provisions of the contract used were made a part of this contract both expressly and by the conduct of the parties.

---

[1] The Sales Contract was Exhibits 2 and 3 at Trial.

It's clear that the agent who prepared this contract was the agent for the seller. It's made clear to everyone and clear in the testimony today. And I cannot say that this was some trivial part of the contract. It was, in fact, an important part of the contract. Much evidence was put on today and I believe in fact, it was of some significance to the contract as a whole.

If you read what the contract says about this item, it says, "This contract is not complete and not ratified unless it includes, and the seller and the purchaser both accept, the following two amendatory forms A and B," and it describes the forms.

I can't tell from the way they describe on these the two forms that I've been provided that were used in the January 14th contract, but apparently, they are – these forms were not – they were signed. They were not made a part of this contract even though the contract clearly provided that the building was of sufficient age to require it and the boxes were checked as they were provided for.

And even further, language is inserted into the contract by hand relating to the question of radon and lead paint testing and it's put in there about who's going to pay for them; nevertheless, still an integral part of the agreement and what these people were doing on this date.

In my view, the complainants cannot rely on any notion that since it was commercial property, it was not needed. It may not have been needed. If it had gone to contract originally as it probably should have been, it would not, perhaps, have been included. But in this case, it

was made very clearly a part of this contract whether it was needed or not.

Also, I don't think the complainants can rely upon the fact that the defendants would not sign them at the time the offer form was filled out. I can't really say – I'm not sure whether they were offered and refused as the agent said or were not offered and, perhaps, just overlooked as the defendants say, but the fact is, and there's not dispute about this, they were not made a part of this contract as was required.

Without these forms being a part of the contract, the provisions in them providing for how to cure this problem, if there was one, any paint problem or radon problem is of no moment as I see it. This contract is not complete. The buyers could terminate the same as they did in a fairly relatively timely fashion, I find for the defendant."[2]

---

[2] Trial transcript pp. 201-203.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE THE TRIAL COURT PROPERLY FOUND FOR DEFENDANTS RUTH ALLEN AND MAE WENDORF GIVEN THAT THE CONTRACT WAS NOT COMPLETED IN A MATERIAL RESPECT.

A. It is within the province of the trial court to assess the credibility of witnesses and the probative value of their testimony.

It is within the province of the trial court to assess the credibility of witnesses and the probative value to be given to their testimony. *Langman v. Alumni Assoc. of the Univ. of Virginia*, 247 Va. 491, 504, 442 S.E.2d 669 (1994), cite in *Richardson v. Richardson*, 242 Va. 242, 246, 409 S.E.2d 148, 151 (1991).

B. If the trial court is not plainly wrong, its findings defeat alternative theories and must be affirmed.

Where the trial court's findings regarding the significance of the two addendum to the contract, given the testimony of the witnesses and the contract, is not plainly wrong, these findings defeat alternative theories, and the trial court did not err in refusing to adopt another meaning or intent. *Langman v. Alumni Assoc. of the Univ. of Virginia, supra* at 504.

Given that it is the role of an appellate court to determine whether the trial court's decision is plainly wrong or not supported by the evidence, taking into account the principle that the trial court's decision comes

to the appellate court with a presumption of correctness, the trial court's findings must be affirmed. *Cooper v. Cooper*, 249 Va. 511, 457 S.E.2d 88 (1995), citing *Surf Realty Corp. v. Standing*, 195 Va. 431, 435, 78 S.E.2d 901, 904 (1953).

C. The trial court properly found that no contract was created.

For there to be a binding real estate contract, all the terms must be agreed to. Here, two critical and required addendum to the contract were not finalized by the real estate agent with the Purchasers for presentment to the Sellers. Accordingly, there was no meeting of the minds, and no completed contract. The Allen and Wendorf termination of the uncompleted offer on October 24, 1997, was appropriate. There was no contract to accept because conditions precedent to a completed contract offer were not fulfilled. It actually was a termination of negotiations to enter into a contract.

Mikels' argument that the statutory language of 42 U.S.C. 485d, cited in paragraph 28 of the contract has no application to commercial property is irrelevant to this case. The Purchasers specifically request the Radon and Lead-Based Paint addendum to enter into the contract. There is no prohibition from using such forms in a commercial transaction, where the parties want the rights and protections these forms provide, and the Court so held.

It is noted that the Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazard form, provided to the real estate agent by Sellers at the time of the listing, and disclosed to the Purchasers by attachment

to the contract, was marked by the Mikels that "Seller has no knowledge of lead-based paint and/or lead based paint hazards in the housing." Yet in its Certiorari, Statement of the Case, paragraph 2, Mikels state that "The Purchasers were appraised of this fact". Given the obfuscation of the existence of Lead-Based Paint it is understandable that Purchasers wanted the protections of repair or contract termination provided by the form, and why the agent did not want to include the forms since there would be no contract signing by Sellers permitting those rights to Purchasers, knowing that there was in fact Lead-Based Paint. The intent to mislead the Purchasers is clearly evident.

Mikels' real estate agent did not have commercial real estate purchase forms in her office, and therefore used residential real estate purchase forms to write up the contract. These forms include the check the box options.[3] The Purchasers availed themselves of this option by specifically checking "yes" for Radon and Lead Based Paint forms. Mikels cannot now complain against Allen and Wendorf for their agent's mistakes, there being no prohibition in the use of the addendum. While the forms may not apply in a given situation by federal law, the contacting parties are not prohibited from requiring the benefits the forms provide in non-statutory situations.

---

[3] Transcript of Trial, page 60.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

RUTH ALLEN AND MAE WENDORF

CHARLES G. PRESTON*
CHARLES G. PRESTON, P.C.
P.O. Box 820
774-C Walker Road
Great Falls, Virginia 22066
(703) 759-3300

Counsel for Respondents
Ruth Allen and Mae Wendorf

**Counsel of Record*